IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
December 18, 2007 Session

STATE OF TENNESSEE v. LARRY E. RATHBONE AND VERONDA GEAN FLEEMAN

Direct Appeal from the Circuit Court for Campbell County
No. 12534 E. Shayne Sexton, Judge

No. E2007-00602-CCA-R3-CD - Filed April 16, 2008

The defendants, Larry E. Rathbone and Veronda Gean Fleeman, were convicted of two counts of child rape, Class A felonies, three counts of aggravated sexual battery, Class B felonies, and one count of attempted child rape, a Class B felony. Thereafter, Defendant Rathbone received a total effective sentence of fifty-six years, and Defendant Fleeman received a total effective sentence of forty-six years. On appeal, the following issues are presented for review: (1) whether the evidence was sufficient to sustain each of the defendants' convictions; and (2) whether the trial court erred in sentencing the defendants. Following a thorough review of the record and the applicable law, we reverse and vacate Defendant Fleeman's convictions for criminal responsibility for child rape, attempted child rape, and aggravated sexual battery as reflected in counts 7 through 11 of the indictment. We affirm Defendant Fleeman's conviction for aggravated sexual battery as reflected in count 12 of the indictment. We affirm Defendant Rathbone's convictions for child rape, attempted child rape, and aggravated sexual battery as reflected in counts 1, 3, 5, and 6 of the indictment. However, we conclude that the trial court failed to merge two convictions for aggravated sexual battery based on alternative theories, and that the trial court did not follow proper procedures in imposing consecutive sentences. We therefore remand this case to the trial court for merger of Defendant Rathbone's convictions for aggravated sexual battery as reflected in counts 2 and 4 of the indictment into his convictions for child rape as reflected in counts 1 and 3 of the indictment, and for a new sentencing hearing regarding consecutive sentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Reversed in Part and Remanded

J.C. McLIN, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Martha Yoakum, District Public Defender, and Charles A. Herman, Sr. Assistant Public Defender, Jacksboro, Tennessee, for the appellant, Larry E. Rathbone and Veronda Gean Fleeman.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; William Paul Phillips, District Attorney General; and Scarlett E. Ellis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The following testimony was presented at the defendants' trial. The victim, C.R., who is the son of Defendant Rathbone, was first called to testify.[1] When C.R. took the stand, however, he began to cry and was unable to answer any questions. At this time, the state prosecutor requested a recess, which the trial court granted. After the recess, C.R. returned to the stand and testified that he was ten years old and presently lived with his "Mamaw and Papaw." C.R. acknowledged that he knew the difference between a good touch and a bad touch. C.R. explained that a bad touch is one on his "middle" or "private." C.R. was shown a sketch drawing of a boy and he indicated on the drawing where the "middle" or "private" was located. He also indicated on the drawing where the "butt" was located.

C.R. testified that his dad, Defendant Rathbone, gave him a bad touch on his private. C.R. recalled that Defendant Rathbone pulled down his pants while they were on the couch in the living room. Defendant Rathbone then put his mouth on C.R.'s private and moved his head up and down. C.R. recalled that his younger brother and Defendant Fleeman were present. C.R. said "no," when asked if Defendant Fleeman said or did anything when the touching occurred. C.R. could not recall exactly when the touching happened.

C.R. testified that there was a mattress in the living room of his dad's house that he occasionally slept on. He would also watch movies while on the mattress. C.R. recalled that on three occasions he watched movies with Defendants Rathbone and Fleeman and his younger brother which involved men and women and privates. When asked if Defendant Rathbone gave C.R. a bad touch in the bedroom, C.R. responded "Yeah." C.R. then elaborated that Defendant Rathbone touched his private with his mouth on a mattress on the floor of the bedroom. C.R. said that Defendant Rathbone's mouth went up and down on his private. According to C.R., Defendant Fleeman and his younger brother witnessed this touching; and at the time, Defendant Fleeman was letting C.R.'s younger brother touch her private.

C.R. testified that on one occasion in the living room, Defendant Rathbone tried to put his private in C.R's butt. C.R. recalled that Defendant Rathbone took his clothes off and C.R.'s clothes off. When asked how he was positioned, C.R. responded that his "front was on [the couch] and [his] back side was up . . . pointing up." According to C.R., Defendant Fleeman was naked and sitting on the couch when it happened. C.R. said that Defendant Rathbone did not put his private in C.R.'s

[1] It is the policy of this court to refer to minor victims of sexual crimes by their initials.

butt. C.R. said he did not know why. When asked if he had ever touched Defendant Rathbone's private, C.R. responded, "Yeah." C.R. acknowledged that he touched Defendant Rathbone's private with his hand on the mattress in the living room, and Defendant Fleeman and his younger brother saw it happen.

C.R. testified that he saw Defendant Fleeman's private on a number of occasions. On one occasion, he touched Defendant Fleeman's private with his private. C.R. recalled that Defendant Fleeman put her private on his private and "[w]ent up and down." According to C.R., this occurred in the living room on the mattress while he was naked and Defendant Rathbone watched.

C.R. testified that Defendant Rathbone told him not to tell, otherwise, he would go to jail. C.R. said that Defendant Fleeman also told him not to tell anyone. C.R. explained that his younger brother told his mom what happened after they got back from visiting their dad. When his mom asked him about it, he did not say anything at first, but he eventually told his mom what happened.

On cross-examination, C.R. said he could not remember what he talked about during the recess. He acknowledged that he told a police officer that his dad had tried to put his penis in C.R.'s butt four times, which differed from his present testimony at trial. C.R. could not remember if he told the officer about his dad putting his mouth on C.R.'s penis. C.R. stated that he visited his dad often and that he loved him. C.R. acknowledged that he had testified at a previous hearing that he wanted to live with his dad and that nothing had happened. C.R. acknowledged that he had trouble remembering things. He also noted that Defendants Rathbone and Fleeman gave him insulin shots. He admitted that he got into trouble for stealing a bike when he was eight years old.

C.R's mother, June Wilson, testified that C.R was the oldest of her three children. She noted that Defendant Rathbone was the father of her children. Mrs. Wilson recounted that she was married to Defendant Rathbone for nine years but they got a divorce about four years ago. As part of the divorce, Mrs. Wilson got custody of the children and Defendant Rathbone got visitation every other weekend and alternating holidays. According to Mrs. Wilson, her two boys went to visit their father on Friday evening, December 10, 2004, but her daughter did not go. Mrs. Wilson explained that sometimes her daughter would not go visit her father on the weekends. Mrs. Wilson recalled that after the boys last visit, she filed a police report against Defendant Rathbone because of something her younger son said. Subsequently, C.R. was interviewed by Police Officer Donnie Anderson of the Campbell County Sheriff's Department with Mrs. Wilson present. Mrs. Wilson noted that C.R. was nine-years-old at the time.

Defendant Rathbone testified on his own behalf. He testified that he had been divorced from Mrs. Wilson for about three-and-one-half years. After his divorce, he and Mrs. Wilson agreed to a custody arrangement where she would have custody of their three children, and he would have visitation every other weekend and alternating holidays. This visitation arrangement was consistently maintained after the divorce. Defendant Rathbone recounted that in November and December of 2004, he was living in a three bedroom, mobile home on Massachusetts Avenue with his girlfriend of two years, Defendant Fleeman. According to Defendant Rathbone, all of his

children would usually visit him on the weekends. Defendant Rathbone recalled that he had visitation on the weekend after Thanksgiving in November of 2004. However, only his two boys came to visit that weekend. Defendant Rathbone claimed that all of his children came to visit with him the first weekend in December 2004. Defendant Rathbone also noted that Defendant Fleeman had a ten-year-old son who would visit them, and sometimes those visits would coincide with the visits from his three children.

Defendant Rathbone testified that the mobile home he lived in had three bedrooms but one of the bedrooms was eliminated to make a bathroom larger. Defendant Rathbone explained that when his children visited him, Defendant Fleeman slept on a mattress in the living room, he slept on the couch or the mattress in the living room, and his children slept in the bedrooms. However, sometimes his children would cry and ask to sleep on the mattress in the living room, and he would let them. Defendant Rathbone recalled that he and Defendant Fleeman usually wore clothes to bed, but on occasion they did not.

Defendant Rathbone denied that he sexually abused C.R. He maintained that he did not put his mouth on C.R.'s penis, or that he made C.R. touch his penis, or that he tried to put his penis in C.R.'s butt. He also maintained that he never made C.R. take off his clothes or expose himself to Defendant Fleeman. He further maintained that Defendant Fleeman was never naked in front of C.R. or touched C.R., as claimed. Defendant Rathbone asserted that he never watched pornographic movies with his children present. However, he acknowledged that he had three pornographic movies in his home. He also recalled that one time he woke up one morning and found his children watching a pornographic movie he had left in the DVD player the night before. Defendant Rathbone said that his children only saw a few seconds of the movie before he turned the television off. Defendant Rathbone stated that he loved his son and would never hurt him. According to Defendant Rathbone, he was not made aware of the accusations against him until he called on Christmas Eve to see if the children were ready to be picked up for a weekend visit.

Defendant Fleeman testified that she was twenty-nine years old and had a ten-year-old son who would come to visit on the weekends. She stated that she had been living with Defendant Rathbone for two years. Defendant Fleeman asserted that she had never been naked around C.R., and she had never laid naked on top of him or rubbed up and down on his body. She also maintained that she had never witnessed Defendant Rathbone engage in any sexual act with C.R. Defendant Fleeman stated that the children were not exposed to any sexual acts between herself and Defendant Rathbone unless the children happened to have left their bedrooms at night and saw them in the living room having sexual intercourse. Defendant Fleeman said that she and Defendant Rathbone never watched pornographic movies with the children. Defendant Fleeman stated that she loved the children and did not do the things C.R. testified to. Defendant Fleeman acknowledged that on a few occasions, she gave C.R. and his younger brother a bath, but normally, they would bathe themselves.

Based upon the foregoing proof, Defendant Rathbone was found guilty of two counts of rape of a child as reflected in counts 1 and 3 of the indictment, three counts of aggravated sexual battery as reflected in counts 2, 4, and 6 of the indictment; and one count of attempted rape of a child as

reflected in count 5 of the indictment. Defendant Fleeman was found guilty of two counts of criminal responsibility for child rape as reflected in counts 7 and 9 of the indictment, two counts of criminal responsibility for aggravated sexual battery as reflected in counts 8 and 10 of the indictment, one count of criminal responsibility for attempted rape of a child as reflected in count 11 of the indictment, and one count of aggravated sexual battery as reflected in count 12 of the indictment.

ANALYSIS

I. Sufficiency of the Evidence

Defendants Rathbone and Fleeman both argue that the evidence was insufficient to sustain their convictions. In rebuttal, the state argues that the evidence was sufficient to sustain each of the defendants' convictions. However, the state concedes that two of the defendants' convictions for aggravated sexual battery should be merged into the defendants' convictions for child rape because they relate to the same criminal conduct.

Our review begins with the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); *see* Tenn. R. App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002).

Rape of a child is defined as the "unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is more than three (3) years of age but less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-522(a). Sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required." *Id.* § 39-13-501(7). Attempt is defined as follows:

(a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:

(1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;

(2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or

(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

(b) Conduct does not constitute a substantial step under subdivision (a)(3) unless the person's entire course of action is corroborative of the intent to commit the offense.

. . . .

Id. § 39-12-101.

Aggravated sexual battery is the "unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances: [t]he victim is less than thirteen (13) years of age." *Id*. § 39-13-504(a)(4). "Sexual contact" is "the intentional touching of the victim's, the defendant's, or any other person's intimate parts, . . . if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." *Id*. § 39-13-501(6). Additionally, "'[i]ntimate parts' includes the primary genital area, groin, inner thigh, buttock or breast of a human being." *Id*. at (2).

A. Defendant Larry Rathbone

As previously noted, Defendant Rathbone challenges the sufficiency of the convicting evidence. In the instant case, C.R., who was ten-years-old at the time of trial, testified that Defendant Rathbone put his mouth on C.R.'s penis (fellatio) on two separate occasions: once in the living room, and once in the bedroom. C.R. also testified that on one occasion Defendant Rathbone tried to put his penis in C.R's butt. C.R. further testified about an incident where he had to touch Defendant Rathbone's penis with his hand. C.R. recalled that Defendant Rathbone told him not to tell anyone what happened because Defendant Rathbone would go to jail. The credibility and weight given to a witnesses' testimony are issues resolved by the jury as the trier of fact. *See Bland*, 958 S.W.2d at 659. Accordingly, we determine that there was sufficient evidence to support Defendant Rathbone's two convictions for child rape as reflected in counts 1 and 3 of the indictment, one conviction for attempted child rape as reflected in count 5 of the indictment, and one conviction for aggravated sexual battery as reflected in count 6 of the indictment.

However, it is clear from the record that Defendant Rathbone was charged with child rape in counts 1 and 3 of the indictment and alternatively charged with aggravated sexual battery in counts 2 and 4 of the indictment for the same criminal conduct. These four charges clearly relate to Defendant Rathbone's actions of putting his mouth on C.R's penis – occurring once in the bedroom and once in the living room. Multiple convictions for the same offense violate both federal and state constitutional prohibitions against double jeopardy. *See* U.S. Const. amend. V; Tenn. Const. art. I, § 10; *see also State v. Denton*, 938 S.W.2d 373, 378-83 (Tenn. 1996). Therefore, the trial court should have merged the lesser aggravated sexual battery convictions reflected in counts 2 and 4 of the indictment with the defendant's child rape convictions in counts 1 and 3 of the indictment. "Merger avoids a double jeopardy problem while protecting the jury's findings." *State v. Timmy Reagan*, No. M2002-01472-CCA-R3-CD, 2004 WL 1114588, at *20 (Tenn. Crim. App., at Nashville, May 19, 2004); *see also State v. Addison*, 973 S.W.2d 260, 267 (Tenn. Crim. App. 1997). We therefore remand this case to the trial court for entry of corrected judgments to reflect the merger of Defendant Rathbone's convictions for aggravated sexual battery as reflected in counts 2 and 4 of the indictment into his convictions for child rape as reflected in counts 1 and 3 of the indictment.

B. Defendant Veronda Fleeman

Defendant Fleeman argues that the evidence was insufficient to convict her under the theory of criminal responsibility. Specifically, Defendant Fleeman avers that there was no proof presented at trial establishing that she had a duty imposed by law or had voluntarily undertaken a duty to prevent the commission of the offenses as required by subdivision (3) of Tennessee Code Annotated section 39-11-402. She further avers that there was no proof that she possessed the requisite intent to promote or assist in the commission of the offenses as required by subdivision three (3) of Tennessee Code Annotated section 39-11-402.

> Under Tennessee law, a person is criminally responsible for the conduct of another if:
> (1) Acting with the culpability required for the offense, the person causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense;
>
> (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense; or
>
> (3) Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.

Id. § 39-11-402. The criminal responsibility statute is the codification of the common-law theories of aiding and abetting and accessories before the fact. *See State v. Carson*, 950 S.W.2d 951, 953-55

(Tenn. 1997). Criminal responsibility is not a separate crime; rather it is "solely a theory by which the State may prove the defendant's guilt of the alleged offense . . . based upon the conduct of another person." *State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999).

To be criminally responsible for the acts of another, it is necessary that the defendant "'in some way associate himself with the venture, act with knowledge that an offense is to be committed, and share in the criminal intent of the principal in the first degree.'" *State v. Maxey*, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994) (quoting *Hembree v. State*, 546 S.W.2d 235, 239 (Tenn. Crim. App. 1976)). "[U]nder the theory of criminal responsibility, presence and companionship with the perpetrator of a felony before and after the commission of the crime are circumstances from which an individual's participation may be inferred." *State v. Phillips*, 76 S.W.3d 1, 9 (Tenn. Crim. App. 2001). "It is not necessary for the individual to take a physical part in the crime. Mere encouragement of the principal is sufficient." *State v. Ball*, 973 S.W.2d 288, 293 (Tenn. Crim. App. 1998). However, "[m]ore than mere presence at the crime scene and an acquaintanceship with the perpetrator is necessary to support a finding that a person is an aider and abettor." *State v. Cecil Eugene McGuire*, No. 03C01-9705-CC-00191, 1998 WL 681280, *6 (Tenn. Crim. App., at Knoxville, Oct. 2, 1998). Moreover, "mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." *Id.* The individual must "'knowingly, voluntarily and with common intent unite with the principal offenders in the commission of the crime.'" *Maxey*, 898 S.W.2d at 757 (quoting *State v. Foster*, 755 S.W.2d 846, 848 (Tenn. Crim. App. 1988)).

We begin our review by noting that the state specifically charged Defendant Fleeman under subdivision (3) of the criminal responsibility statute, which ascribes a legal duty to make a reasonable effort to prevent the commission of a crime. For example, count 7 of the indictment reads:

> [T]hat Veronda Gean Fleeman prior to the finding of this indictment, on or about November – December 2004 . . . did unlawfully, feloniously, intentionally, and knowingly sexually penetrate [C.R.], a person less than thirteen (13) years of age, in that the said Veronda Gean Fleeman acting with intent to promote or assist in the offense aided Larry Rathbone in the commission of the offense when the said Veronda Fleeman had a duty to prevent the commission of the offense in violation of T.C.A. § 39-13-522 and T.C.A. § 39-11-402, all of which is against the peace and dignity of the State of Tennessee.

We also note that the jury charge does not contain instruction on the theory of criminal responsibility as set forth in subdivision (2) of Tennessee Code Annotated section 39-11-402; but rather, the charge instructs on the theory of criminal responsibility as set forth in subdivision (3) of Tennessee Code Annotated section 39-11-402. The charge informed the jury that:

> The defendants are criminally responsible for an offense committed by the conduct of another if, having a duty imposed by law or voluntarily undertaken to

> prevent the commission of the offense and acting with intent to benefit in the proceeds or results of the offense or to promote or assist its commission, the defendant fails to make a reasonable effort to prevent the commission of the offense.

The charge did not define "legal duty" for the jury, or instruct the jury on when such a duty attaches. Additionally, the trial court erroneously informed the jury that Defendant Fleeman could be found criminally responsible for Defendant Rathbone's conduct as charged in counts 7 through 11 of the indictment because "she was present and observed" the offenses. Apparently, the trial court incorporated this information into its charge from the state's summary of the charges against the defendants which had been marked and entered into evidence as Exhibit 2. That said, we now address whether the evidence was legally and factually sufficient to prove that Defendant Fleeman, having a duty imposed by law or voluntarily undertaken to prevent commission of the offenses and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, failed to make a reasonable effort to prevent commission of the offenses. *See* Tenn. Code Ann. § 39-11-402(3).

In the instant case, proof was presented that Defendant Fleeman was Defendant Rathbone's girlfriend and lived with him in his mobile home for approximately two years. Defendant Rathbone was C.R's father and C.R. visited him every other weekend and alternating holidays. Mrs. Wilson was C.R's biological mother, and she had primary custody of C.R. On occasion, Defendant Fleeman administered C.R.'s insulin shots and bathed him. Under the theory of criminal responsibility, Defendant Fleeman was convicted of one count of child rape (count 7) based on evidence that she was present and did not say anything when Defendant Rathbone put his mouth on C.R.'s penis in the living room. She was also convicted of aggravated sexual battery (count 8) based on the same evidence. She was convicted of attempted child rape (count 11) based on evidence that she was naked and observed Defendant Rathbone attempt to put his penis in C.R.'s butt. Defendant Fleeman was convicted of another count of child rape (count 9) based on the evidence that while Defendant Rathbone put his mouth on C.R's penis in the bedroom, she was letting C.R.'s younger brother touch her private. She was also convicted of aggravated sexual battery (count 10) based on the same evidence. There was also evidence presented where at some point in time, Defendant Fleeman told C.R. not to tell what happened because Defendant Rathbone would go to jail.

According to the comments to Tennessee Code Annotated section 39-11-402, subdivision (3) places criminal liability in the situation where a person who has a legal duty to prevent the crime fails to do so with the specific intent to further the crime. While not expressly stated, it appears that subdivision (3) relates to situations where a person may be criminally responsible for the conduct of another by failing to act. In this regard, we note that "for criminal liability to attach, it must be found that there was a legal duty to act and not simply a moral duty." *State v. Jeffrey Lloyd Winders*, No. 88-142-III, 1989 WL 105710, at *2-3 (Tenn. Crim. App. Nashville, Sept. 14, 1989) (citing LaFave & Scott, Criminal Law § 3.3(a) (2d ed. 1986)).

Although there is no Tennessee case law directly on point, the following response by this court is instructive:

> We do not believe the legislature intended to require every citizen to exercise an affirmative duty "imposed by law" to prevent the commission of a crime. Rather, this section refers to members of law enforcement agencies and others (such as care givers or custodial parents) vested with a specific duty to prevent a crime from occurring. Also, this section refers to those who have voluntarily undertaken to prevent commission of the offense." Tenn. Code Ann. 39-11-402(3).

See State v. Michael Tyrone Gordon, No. 01C01-9605-CR-00213, 1997 WL 578961, at *6 (Tenn. Crim. App., Nashville, Sept. 18, 1997) (upholding defendant's conviction for child neglect under theory of criminal responsibility) (Judge Reid dissenting). Also instructive is this court's discussion in *State v. Hodges*, 7 S.W.3d 609 (Tenn. Crim. App. 1998). In *Hodges*, the defendant was convicted of criminal responsibility for the first degree felony murder and the aggravated child abuse of his two-year-old step child. *Id.* at 613. The proof showed that the defendant was married to the child's mother and they lived together. *Id.* at 616. The defendant cared for the child alone between the hours of approximately 6:30 a.m. and 5:00 p.m while the mother of the child worked. *Id*. at 621. From this evidence, a panel of this court stated the following:

> [A]s [the child's] step-parent and caretaker, [the defendant] bore a duty to protect [the child] from harm and provide her with emergency attention. [The defendant], although not the [child's] legal guardian, was entrusted by her legal guardian to watch over her on a daily basis. We consider this to be a "duty imposed by law" within the meaning of § 39-11-402(3).

Id. at 623. Accordingly, it appears that the special relationship of parent and child or caretaker and child creates a legal duty to protect the child from harm, such that the parent or caretaker who breaches that duty is subject to criminal liability as set forth in section 39-11-402(3).[2]

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[2] After a thorough and painstaking search of case law in Tennessee, we have not located any authority extending the legal duty to a child beyond the special relationships identified. We refrain from doing so today as it is not our role to sit as judicial legislators and create new duties and liabilities which theretofore did not exist. We note that the dissent in *State v. Miranda* offers particular insight regarding the problems associated with (1) the application of affirmative duties set forth in the common law to a criminal responsibility statute; and (2) the imposition of criminal liability based upon a failure to act when one has a legal duty to do so. 715 A.2d 680, 694-701 (Conn. 1998) (Justice Berdon dissenting) *overruled* by *State v. Miranda*, 878 A.2d 1118 (Conn. 2005). We also find Paul Robinson's article entitled "Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States," instructive as to why the imposition of affirmative legal obligations on persons to protect children from abuse is best left to the legislature. The article notes that "[t]here is a general, albeit declining, reluctance in the United States to impose affirmative duties and to punish nonperformance of those duties. Various explanations for the reluctance to criminalize inactivity have been offered. First, there is difficulty in defining with sufficient clarity the effort that must be expended in order to satisfy the duty. Second, the inherent ambiguity in defining the scope of a duty leads to speculation about guilt and thereby poses a threat to society more serious than the harm prevented by requiring affirmative conduct. Third, because 'prevailing attitudes draw sharp distinctions between overt action and passivity[, the] legislature cannot ignore the mores, nor should it implement them beyond necessary limits.' Finally, a governmental demand to perform is significantly more intrusive than a command to refrain from harmful action and therefore must be justified by a (continued...)

However, in the instant case, the evidence does not establish that Defendant Fleeman, as Defendant Rathbone's girlfriend, had a legal duty to protect C.R. from the harm caused by Defendant Rathbone, such that the breach of the duty by her failure to prevent the abuse exposed her to criminal liability under section 39-11-402(3). First, it is clear from the evidence that Defendant Fleeman was not C.R's biological or legal parent. Second, the evidence is deficient with regard to whether Defendant Fleeman voluntarily assumed responsibility for the care and welfare of C.R. during his weekend visits to see his father, Defendant Rathbone. At most, the evidence establishes that on rare occasion, Defendant Fleeman administered C.R.'s insulin shots and bathed him. Clearly, this evidence was not sufficient for the jury to find beyond a reasonable doubt that Defendant Fleeman was part of the class of persons who had a legal duty to prevent the commission of the offenses as required by subdivision (3) of the criminal responsibility statute.[3]

We would further note that there is only a scintilla of evidence from which the jury could draw the inference that Defendant Fleeman was acting with the specific intent to promote or assist in the sexual abuse of C.R. perpetrated by Defendant Rathbone. More than Defendant Fleeman's presence must be shown to hold her criminally responsible for the sexual offenses committed by Defendant Rathbone. The evidence must establish beyond a reasonable doubt that she, having knowledge of the criminal intent entertained by Defendant Rathbone, participated in the perpetration of the offenses to the extent that her participation demonstrates the intent on her part to associate with the commission of the offense. *See State v. Gray*, 628 S.W.2d 746, 748 (Tenn. Crim. App. 1981) ("Knowledge of and intent to aid and abet in the crime being committed is essential to show a person is an aider and abettor."). In other words, subdivision (3) of the criminal responsibility statute not only requires a legal duty, but also requires that the individual act with a culpable mental state, specifically, the intent to promote or assist the commission of the offense or to benefit in the proceeds or results of the offense. "A person acts with intent as to the nature or result of conduct when it is that person's conscious objective or desire to engage in the conduct or cause the result." *Carson*, 950 S.W.2d at 954 (quoting Tenn. Code Ann. § 39-11-302(a)(1991)). It is the shared intent formed between two or more people which renders one of them criminally responsible for a criminal offense committed by the other.

Although this court is sickened by the moral depravity reflected in this record, our function is to determine whether the evidence was sufficient to prove that Defendant Fleeman violated the

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[2](...continued)
significant overriding public interest and must be imposed in a way that minimizes the extent of intrusion." 29 N.Y.L. Sch. L.Rev. 101, 104 (1984).

[3] We also find it difficult to reconcile how Defendant Fleeman can be found criminally liable for the offenses of child rape, attempted child rape, and aggravated sexual battery as a result of her failure to act when each of these offenses requires proof of an overt criminal act. Nonetheless, we need not delve into this legal quagmire as we have determined that the evidence was insufficient to show that Defendant Fleeman had a legal duty to prevent the commission of the offenses.

criminal responsibility statute under which she was convicted. "The law, and the courts, should delineate carefully between conduct which is criminal and conduct which only arouses righteous indignation." *Winders*, 1989 WL 105710, at *8. That being said, we conclude that the evidence was legally and factually insufficient to sustain Defendant Fleeman's convictions under the theory of criminal responsibility as set forth in subdivision (3) of Tennessee Code Annotated section 39-11-401. Accordingly, we reverse and vacate Defendant Fleeman's convictions for child rape, attempted child rape, and aggravated sexual battery arising from the theory of criminal responsibility (counts 7 through 11).

Notwithstanding our decision to reverse and vacate the aforementioned convictions, we determine that the evidence was sufficient to support Defendant Fleeman's conviction for aggravated sexual battery as charged in count 12. At trial, C.R. testified that Defendant Fleeman put her private on his private and "[w]ent up and down." Defendant Fleeman told C.R. not to tell anyone what had happened. In light of this evidence, we conclude that a rational juror could have found Defendant Fleeman guilty of the aggravated sexual battery of C.R. based upon her own criminal conduct.

II. Sentence Length

Both Defendants Rathbone and Fleeman challenge the length of their individual sentences, arguing that the trial court erred in finding certain enhancement factors and ignoring the existence of mitigating factors when ordering the length of their sentences. Both argue that doing so is inconsistent with the purposes and principles of Tennessee's Sentencing Reform Act. In rebuttal, the state first argues that under the 2005 amendments to the Sentencing Reform Act, "a defendant may no longer challenge on appeal a trial court's application of enhancement and mitigating factors, although the defendant may still challenge the length of a sentence as unreasonable." Alternatively, the state argues that the trial court properly determined the length of the defendants' sentences after considering applicable enhancement and mitigating factors.

When a defendant challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401. This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. We will uphold the sentence imposed by the trial court if (1) the sentence complies with our sentencing statutes, and (2) the trial court's findings are adequately supported by the record. *See State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001); *see also* Tenn. Code Ann. § 40-35-210(f).

In conducting a de novo review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103, -210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). Enhancement factors may be considered only if they are "appropriate for the offense" and "not already an essential element of the offense." Tenn. Code Ann. § 40-35-114.

Initially, we address the state's argument that under the 2005 amendments to the Sentencing Reform Act, "a defendant may no longer challenge on appeal a trial court's application of enhancement and mitigating factors." In the instant case, the record reflects that both defendants executed a waiver of their ex post facto protections, which allowed them to be sentenced under the 2005 amendments to the Criminal Sentencing Reform Act of 1989. The 2005 amendments to the Sentencing Act rendered the enhancement factors advisory only and abandoned a statutory minimum sentence. *See* Tenn. Code Ann. §§ 40-35-114, -35-210(c). As amended, the trial court is required to impose a sentence within the range of punishment, determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. The statute further provides that in imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by certain advisory guidelines, including the presence or absence of enhancement factors. *Id*. § 40-35-210(c)(2).

Prior to 2005, Tennessee Code Annotated section 40-35-401(b) stated: "An appeal from a sentence may be on one (1) or more of the following grounds: (1) The sentence was not imposed in accordance with this chapter; or (2) The *enhancement and mitigating factors were not weighed properly*, and the sentence is excessive under the sentencing considerations set out in § 40-35-103." Tenn. Code Ann. § 40-35-401(b) (2003) (emphasis added). Pursuant to the 2005 amendments, the language related to the weighing of enhancement and mitigating factors set forth in subdivision (2) was deleted and section 40-35-401(b) was amended as follows:

> An appeal from a sentence may be on one (1) or more of the following grounds: (1) The sentence was not imposed in accordance with this chapter; (2) The sentence is excessive under the sentencing considerations set out in §§ 40-35-103 and 40-35-210; or (3) The sentence is inconsistent with the purposes of sentencing set out in §§ 40-35-102 and 40-35-103.

Id. § 40-35-401(b) (2006). We note that a panel of this court has previously determined that our current sentencing statutes do not permit defendants to appeal the weight afforded to enhancement factors by a trial court. *See State v. Terrance Patterson*, No. W2005-01638-CCA-R3-CD, 2007 WL 2700160, at *10 (Tenn. Crim. App. Sept. 17, 2007) ("The fact that the General Assembly deleted the language regarding the weighing of enhancement and mitigating factors demonstrates that the General Assembly intended that a defendant may no longer allege as grounds for relief on appeal that the sentencing court erroneously weighed sentencing enhancement factors.").

However, it is our view that a defendant is not absolutely barred from appealing the misapplication of enhancement and mitigating factors as it relates to the imposition of an excessive sentence. As aptly stated by a panel of this court:

> The 2005 amendments arose out of a concern by the Tennessee General Assembly that the provisions of Tennessee's Criminal Sentencing Reform Act of 1989 may violate a defendant's constitutional Sixth Amendment right to trial by jury as contemplated by the United States Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and its progeny. *See also Cunningham v. California*, --- U.S. ----, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007); *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Thus, the 2005 amendments abandoned a statutory presumptive minimum sentence and directed a trial court to impose a sentence within the applicable range. The 2005 amendments set forth certain "advisory sentencing guidelines" which the trial court is required to consider but is not bound by. These include:
>
> > (1) [t]he minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
> >
> > (2) [t]he sentence length within the range should be adjusted, as appropriate by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.
>
> T.C.A. § 40-35-210(c).
>
> . . . .
>
> A defendant has the statutory right to appeal a sentence not imposed in accordance with the Criminal Sentencing Reform Act. T.C.A. § 40-35-401(b)(1). Specifically, a defendant may raise as a ground on appeal that his sentence is excessive under the sentencing considerations set forth in section 40-35-210, which section includes a trial court's consideration of enhancement factors in determining the length of a sentence. *Id*. § 40-35-210(c)(2). The trial court is required to place on the record "what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, to ensure fair and consistent sentencing." *Id*. § 40-35-210(d). *Once applied, the chosen enhancement factor becomes a sentencing consideration subject to review under Tennessee Code Annotated section 40-35-401(c)(2)*. Thus, Defendant's challenge to the length of his sentences relate to the sentencing considerations set forth in Tennessee Code Annotation section

40-35-210, and we will consider his issue concerning the trial court's application of enhancement factors.

State v. Eric James Osborne, No. M2006-00888-CCA-R3-CD, 2007 WL 2437955, *19-20 (Tenn. Crim. App., at Nashville, Aug. 28, 2007), *perm. app. denied* (Tenn. Jan. 28, 2008) (emphasis added). Accordingly, we proceed to review the defendants' argument that the application of enhancement factors and the non-application of mitigating factors resulted in an excessive sentence.

In the instant case, the trial court found the following enhancement factors applicable to both Defendant Rathbone and Defendant Fleeman: the defendants had a previous history of criminal convictions or criminal behavior; and the defendants abused a position of public or private trust. *See* Tenn. Code Ann. § 40-35-114(1), (14). The court also found that Defendant Rathbone was a leader in the commission of an offense involving two or more criminal actors. *Id*. § 40-35-114(2).

Defendant Rathbone proposed several mitigating factors, including the fact that he did not have a felony criminal record; that he had been gainfully employed all of his life; that he provided financial support to his children and took care of their needs; that he helped with the Special Olympics as a volunteer; that the offenses for which he was convicted neither caused nor threatened serious bodily injury; and that his behavior while incarcerated was exemplary. Defendant Fleeman advanced several mitigating factors, including the fact that she had a history of caring for children; that she had been a Sunday School teacher; that she had the love and loyalty of her family; that she had been counseling her young niece through letters; and that her conduct neither caused nor threatened serious bodily injury. The trial court stated that it found "nothing of a mitigating nature that would affect [the] sentence[s]." Thereafter, the trial court sentenced Defendant Rathbone to twenty-three years for each Class A felony and ten years for each Class B felony. The court sentenced Defendant Fleeman to eighteen years for each Class A felony and ten years for each Class B felony.[4]

We glean from the record that Defendant Rathbone had six prior misdemeanor convictions, including convictions for evading arrest, disorderly conduct, DUI, and assault. Additionally, Defendant Fleeman had misdemeanor possession of marijuana, criminal impersonation, and a probation violation on her record. Based upon these prior convictions, we conclude that the record supports the court's application of enhancement factor (1). With regard to enhancement factor (14), the record supports the application of this factor. Referring to Defendant Rathbone, the court stated, "I can't imagine the trust that young man would give his father being any more of an endearing trust." The court also found that Defendant Fleeman had abused a private trust, but not to the same extent as Defendant Rathbone. As for factor (2), that Defendant Rathbone was a leader in the commission of the offense, we have reviewed the record and found ample support for the court's

[4] The rape of a child is Class A felony. Tenn. Code Ann. § 39-13-522(b). The sentence range for a standard offender convicted of a Class A felony is fifteen to twenty-five years. *Id*. § 40-35-112. Attempted child rape and aggravated sexual battery are Class B felonies. *Id*. §§ 39-12-107; 39-13-522. The sentence range for a standard offender convicted of a Class B felony is eight to twelve years. *Id*. § 40-35-112.

application of this factor. It is clear from the record that Defendant Rathbone instigated most of the sexual offenses perpetrated against C.R. Accordingly, we perceive no error in the court's application of these factors.

Regarding the court's failure to consider the submitted mitigating evidence, we note that the record demonstrates the presence of some mitigating evidence and the court should have considered it.[5] However, as previously noted, sentence adjustment based on the presence or absence of mitigating and enhancement factors is advisory and not mandatory. Therefore, even though the court declined to recognized the submitted mitigating evidence, we perceive no error in the enhancement of the defendants' sentences because they were imposed in compliance with our sentencing guidelines and adequately supported by the record. Therefore, the defendants are not entitled to relief on this issue.

III. Consecutive Sentencing

The defendants both challenge the imposition of consecutive sentencing.[6] The defendants first argue that the imposition of consecutive sentencing violates their Sixth Amendment right to a jury trial as dictated in *Blakely v. Washington*, 542 U.S. 296 (2004) and *Cunningham v. California*, 549 U.S. ---- 127 S.Ct. 856 (2007). The defendants submit that the judicial fact finding necessary for imposing consecutive sentencing is tantamount to the enhancement of a determinate sentence based entirely on facts never found by the jury or admitted by the defendant. In other words, as written, Tennessee's sentencing scheme creates a presumption of concurrent sentencing which can only be overcome by judicial fact-finding which is violative of the constitutional principles espoused in *Blakely* and its progeny. Therefore, the Sixth Amendment right to a jury trial applies to the enhancement or "doubling" of sentences via the ordering of consecutive sentencing.

Upon review, we note that both this court and the Tennessee Supreme Court have addressed the applicability of *Blakely v. Washington* to consecutive sentencing. This court has consistently adhered to the view that the imposition of consecutive sentencing does not offend a defendant's Sixth Amendment rights as set forth in *Blakely* and its progeny. *See, e.g., State v. John Britt*, No. W2006-01210-CCA-R3-CD, 2007 WL 4355480, *13 (Tenn. Crim. App., at Jackson, Dec. 12, 2007). *State v. Joseph Wayne Higgins*, No. E2006-01552-CCA-R3-CD, 2007 WL 2792938, at *14 (Tenn. Crim. App., at Knoxville, Sept. 27, 2007); *State v. Anthony Allen*, No. W2006-01080-CCA-R3-CD, 2007 WL 1836175, at *2-3 (Tenn. Crim. App., at Jackson, June 25, 2007), *perm. app. granted* (Tenn. Oct. 15, 2007); *State v. Eric Lumpkins*, No. W2005-02805-CCA-R3-CD, 2007 WL 1651881, at *12 (Tenn. Crim. App., at Jackson, June 7, 2007), *perm. app. granted* (Tenn. Oct. 15, 2007);

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[5] We note as a practical matter, that a trial court's blanket refusal to consider mitigating evidence may eventually create a chilling effect on a defendant's motivation to submit mitigating evidence.

[6] Because only one of Defendant Fleeman's convictions remains in effect given our holding herein, the issue of consecutive sentencing is no longer applicable to Defendant Fleeman's case.

State v. Earice Roberts, No. W2003-02668-CCA-R3-CD, 2004 WL 2715316, at *12 (Tenn. Crim. App., at Jackson, Nov. 23, 2004), *perm. app. denied* (Tenn. Mar. 21, 2005); *State v. Lawrence Warren Pierce*, No. M2003-01924-CCA-R3-CD, 2004 WL 2533794, at *13-14 (Tenn. Crim. App., at Nashville, Nov. 9, 2004), *perm. app. denied* (Tenn. Feb. 28, 2005). In addition, our supreme court has noted that *Blakely* does not affect consecutive sentencing determinations. *State v. Robinson*, 146 S.W.3d 469, 499 n.14 (Tenn. 2004). Accordingly, we conclude that *Blakely* and *Cunningham* do not affect consecutive sentencing determinations. The defendants' are not entitled to relief on this issue.

The defendants next contend that the trial court erred in imposing consecutive sentences. Specifically, the defendants argue that the court did not make the requisite findings to support consecutive sentencing based on Tennessee Code Annotated section 40-35-115(b)(5).

A trial court may impose consecutive sentencing upon a determination by a preponderance of the evidence that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. Therefore, pursuant to this code section, a trial court may impose consecutive sentencing if it determines any one of the following criteria applies:

> (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b). The trial court should also consider general sentencing principles including whether or not the length of a sentence is justly deserved in relation to the seriousness of the offense. *See State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002).

In the instant case, the trial court ordered the defendants' sentences for rape of a child to run consecutively to each other and consecutively to their sentence for attempted rape of a child with the remainder of the sentences to run concurrently. As a result, Defendant Rathbone received a total effective sentence of fifty-six years, and Defendant Fleeman received a total effective sentence of forty-six years. The trial court imposed consecutive sentences based on Tennessee Code Annotated section 40-35-115(b)(5), wherein the court found:

> Taking us on to consecutive sentencing, this court is going to find that each defendant [was] convicted . . . of two more offenses - - statutory offenses involving sexual abuse of a minor. And because of that, I find by a preponderance of evidence that consecutive sentencing is imposed.

The defendants assert that the trial court failed to address the aggravating circumstances, the physical and mental impact on the victim, the time period of the undetected sexual activity, and the nature and scope of the sexual act beyond that inherent in the offenses. The defendants maintain that the trial court essentially ordered consecutive sentences based on the convicting offense. The defendants point out that Tennessee law already provides an appropriate sentence for child rape by making the offense a Class A felony and requiring 100% service of the sentence; therefore, logic and fairness dictate that there should be more findings regarding the nature and scope of the sexual abuse than those attributable to the offenses. The defendants further asserts that the record is devoid of "aggravating circumstances" necessary for imposing consecutive sentencing under section 40-35-115(b)(5).

It appears from the record that the trial court merely recited part of the statutory language of Tennessee Code Annotated section 40-35-115(b)(5), and did not make the appropriate findings of fact necessary to impose consecutive sentencing under this provision. When determining whether consecutive sentencing is appropriate under this provision, a trial court must consider the following criteria: (1) aggravating circumstances arising from the defendant's relationship with the victim, (2) the time span of the defendant's undetected sexual activity, (3) the nature and scope of the sexual acts, and (4) the extent of the residual, physical *and* mental damage to the victim. Tenn. Code Ann. § 40-35-115(b)(5). Moreover, the trial court must "specifically recite the reasons" behind its imposition of a consecutive sentence. Tenn. R. Crim. P. 32(c)(1). Therefore, we conclude that re-sentencing on this matter would be appropriate. We note that in the absence of sufficient evidence to support the application of this factor, our sentencing statutes require the imposition of concurrent sentencing. *Id*. § 40-35-115(d). Accordingly, we remand the case to the trial court for a determination as to whether Defendant Rathbone's sentences should be served concurrently or consecutively. The court need not make the same sentencing determination for Defendant Fleeman as only one of her convictions remain.

CONCLUSION

Based upon the foregoing authorities and reasoning, we reverse and vacate Defendant Fleeman's convictions for child rape, attempted child rape, and aggravated sexual battery as reflected in counts 7 through 11 of the indictment. We affirm Defendant Fleeman's conviction for aggravated sexual battery as reflected in count 12 of the indictment. We affirm Defendant Rathbone's convictions for child rape, attempted child rape, and aggravated sexual battery as reflected in counts 1, 3, 5, and 6 of the indictment. However, we conclude that Defendant Rathbone's convictions for aggravated sexual battery as reflected in counts 2 and 4 of the indictment should be merged into his convictions for child rape as reflected in counts 1 and 3 of the indictment. We also conclude that the trial court did not follow proper procedures in imposing consecutive sentences. We therefore remand this case to the trial court for entry of corrected judgments to reflect the merger of Defendant Rathbone's convictions consistent with this opinion, and for a new sentencing hearing regarding whether Defendant Rathbone's sentences should be served concurrently or consecutively.

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J.C. McLIN, JUDGE